

Table of Contents

Chapter 1: General Policy Issues

	(Inception, Agents, Misrepresentations, Termination, etc.).....	1
§ 1.1	Policy Inception.....	1
§ 1.2	Binders.....	1
§ 1.3	Agents.....	2
§ 1.4	Insurance Applications.....	6
§ 1.5	Misrepresentations and Rescission.....	8
§ 1.6	Waiver and Estoppel.....	15
§ 1.7	Mistake.....	20
§ 1.8	Certificates of Insurance.....	24
§ 1.9	Delivery of the Policy.....	25
§ 1.10	Duty to Read the Policy.....	27
§ 1.11	Effective Date and Time of Coverage Inception.....	30
§ 1.12	Renewals.....	30
§ 1.13	Modification.....	36
§ 1.14	Reformation.....	37
§ 1.15	Cancellation – By the Insurer.....	37
§ 1.16	Termination.....	41

Chapter 2: Interpreting Insurance Policies.....

§ 2.1	General Rules of Policy Language Construction.....	43
§ 2.2	Ambiguous Terms.....	45
§ 2.3	Parol Evidence.....	53
§ 2.4	The Reasonable Expectations Doctrine.....	53
§ 2.5	Technical and Customary Definitions.....	55
§ 2.6	Construction of Policy As A Whole.....	57
§ 2.7	Issues Regarding Illusory Coverage.....	60

Table of Contents

§ 2.8	Grammatical Construction.....	61
§ 2.9	Role of Judge and Jury in Construction of Policy.....	63
§ 2.10	Burden of Proof.....	63
§ 2.11	Burden of Proof – Conditions.....	64
§ 2.12	Choice of Law.....	64
§ 2.13	Choice of Law – Bad Faith.....	66
Chapter 3: Property Insurance.....		69
§ 3.1	Insurable Interest.....	69
§ 3.2	Insurable Interest – Extent to Which Interest Is Insurable.....	71
§ 3.3	Insurable Interest – Expectancies.....	72
§ 3.4	Insurable Interest – Vendor or Purchaser.....	75
§ 3.5	Insurable Interest – Mortgagor, Mortgagee, and Lost Payees.....	78
§ 3.6	Insurable Interest – Former Spouses.....	81
§ 3.7	Insurable Interest – Former Owners.....	82
§ 3.8	All-Risk and Named Perils Policies.....	84
§ 3.9	Direct Physical Loss or Damage.....	86
§ 3.10	Depreciation – Replacement Cost and Actual Cash Value.....	88
§ 3.11	Coinurance.....	90
§ 3.12	Business Income.....	91
§ 3.13	Business Interruption.....	95
§ 3.14	Fire Insurance.....	97
§ 3.15	Flood Insurance.....	100
§ 3.16	Collapse.....	101
§ 3.17	Exclusions – Deterioration, Inherent Vice, Latent Defect, Wear, and Tear.....	105
§ 3.18	Exclusions – Water Damage (Including Flood) – “Surface Water”.....	109
§ 3.19	Exclusions – Water Damage (Including Flood) – Causation.....	111
§ 3.20	Exclusions – Seepage or Leakage.....	116
§ 3.21	Exclusions – Pollution.....	116

Table of Contents

§ 3.22	Exclusions – Mold, Fungus, or Rot (“Ensuing Loss”).....	118
§ 3.23	Exclusions – Insured’s Absence from Property.....	119
§ 3.24	Conditions – Proof of Loss.....	120
§ 3.25	Conditions – Examination Under Oath.....	121
§ 3.26	Conditions – Concealment, Fraud, and Misrepresentation Provision.....	122
§ 3.27	Conditions – Concealment, Fraud, and Misrepresentation Provisions – Innocent Spouse or Co-Insured.....	124
§ 3.28	Conditions – Appraisal.....	126
Chapter 4: General Liability Insurance – Basic Principles and Coverages.....		129
§ 4.1	General Coverage.....	129
§ 4.2	Legal Obligation of Insured to Pay.....	130
§ 4.3	Sums Paid “As Damages” – Tort vs. Contractual Liability.....	132
§ 4.4	Sums Paid “As Damages” – Injunctive Relief.....	134
§ 4.5	Bodily Injury – What Constitutes Bodily Injury?.....	135
§ 4.6	Property Damage.....	138
§ 4.7	Property Damage – Physical Injury.....	138
§ 4.8	Property Damage – Tangible Property.....	142
§ 4.9	Property Damage – Loss of Use of Tangible Property.....	144
§ 4.10	Property Damage – Economic Loss.....	146
§ 4.11	Property Damage – During the Policy Period.....	149
§ 4.12	“Occurrence”.....	152
§ 4.13	“Occurrence” – “Accident”.....	155
§ 4.14	“Occurrence” – “Accident” – Faulty Workmanship; Construction Defects.....	156
§ 4.15	“Occurrence” – Intentional Torts.....	158
§ 4.16	“Occurrence” – Continuous or Repeated Exposure to Conditions....	165
§ 4.17	Personal and Advertising Injury Coverage – Generally.....	166
§ 4.18	Personal Injury – False Arrest, Detention, or Imprisonment.....	169
§ 4.19	Personal Injury – Malicious Prosecution.....	170

Table of Contents

§ 4.20	Personal Injury – Wrongful Entry.....	170
§ 4.21	Personal Injury – Libel, Slander, or Defamation.....	171
§ 4.22	Advertising Injury.....	173
§ 4.23	Punitive Damages Coverage.....	175
Chapter 5: General Liability Insurance – Exclusions.....		177
§ 5.1	Introduction.....	177
§ 5.2	Expected or Intended Injury Exclusion.....	177
§ 5.3	Expected or Intended Injury – Criminal Liability.....	181
§ 5.4	Contractual Liability.....	182
§ 5.5	Liquor Liability.....	186
§ 5.6	Workers’ Compensation and Similar Laws.....	193
§ 5.7	Employer’s Liability.....	194
§ 5.8	Pollution.....	200
§ 5.9	Professional Liability.....	205
§ 5.10	Aircraft, Automobile, or Watercraft.....	208
§ 5.11	Mobile Equipment.....	211
§ 5.12	War.....	213
§ 5.13	Damage to Property.....	214
§ 5.14	Damage to Your Product.....	226
§ 5.15	Damage to Your Work.....	227
§ 5.16	Damage to Your Work – Subcontractor Exception.....	231
§ 5.17	Damage to Impaired Property or Property Not Physically Injured.....	232
§ 5.18	Recall of Products, Work, or Impaired Property.....	235
§ 5.19	Personal and Advertising Injury.....	237
§ 5.20	Electronic Data.....	237
§ 5.21	Recording and Distribution of Material or Information in Violation of Law.....	238
§ 5.22	Assault and Battery.....	239
§ 5.23	Mold.....	242
§ 5.24	Punitive Damages.....	244

Table of Contents

§ 5.25	Knowing Violation of Rights of Another.....	245
§ 5.26	Material Published with Knowledge of Falsity.....	245
§ 5.27	Material Published Prior to Policy Period.....	246
§ 5.28	Criminal Acts.....	246
§ 5.29	Contractual Liability.....	246
§ 5.30	Breach of Contract.....	247
§ 5.31	Quality or Performance of Goods – Failure to Conform to Statements.....	247
§ 5.32	Wrong Description of Prices.....	247
§ 5.33	Infringement of Copyright, Patent, Trademark or Trade Secret.....	248
§ 5.34	Insureds in Media and Internet Type Business.....	248
§ 5.35	Electronic Chatrooms or Bulletin Boards.....	249
§ 5.36	Unauthorized Use of Another’s Name or Product.....	249
§ 5.37	Pollution.....	250
§ 5.38	Pollution-related.....	250
§ 5.39	War.....	251
§ 5.40	Recording and Distribution of Material or Information in Violation of Law.....	251
Chapter 6: General Liability Insurance – Conditions.....		253
§ 6.1	Bankruptcy.....	253
§ 6.2	Notice of Occurrence.....	254
§ 6.3	Late Notice.....	255
§ 6.4	Duty to Cooperate.....	258
§ 6.5	Voluntary Payments.....	260
§ 6.6	Limitation of Suit (“Legal Action Against Us”.....	261
§ 6.7	Other Insurance.....	262
§ 6.8	Other Insurance – Contribution Among Insurers for Indemnity Payments.....	268
§ 6.9	Other Insurance – Contribution Among Insurers for Defense Costs.....	270

Table of Contents

Chapter 7: Professional Liability Insurance.....	279
§ 7.1 Insuring Agreement.....	279
§ 7.2 “Claims-Made-and-Reported” Coverage.....	281
§ 7.3 “Claims-Made-and-Reported” Coverage – What Constitutes A Claim?.....	287
§ 7.4 “Claims-Made-and-Reported Coverage” – Subsequent Renewals....	289
§ 7.5 Professional Services.....	291
§ 7.6 Potential Claims.....	296
§ 7.7 Exclusions – Known Claims not Disclosed (“Prior Acts”).....	297
§ 7.8 Exclusions – Prior Knowledge.....	304
§ 7.9 Conditions.....	308
§ 7.10 Rescission.....	311
§ 7.11 “Claims-Made-and-Reported Coverage” – Potential Interplay with Occurrence Policies.....	316
 Chapter 8: Excess Insurance.....	321
§ 8.1 Nature of Excess and Umbrella Insurance.....	321
§ 8.2 Exhaustion of Underlying Limits.....	322
§ 8.3 Excess Insurers and “Drop-Down” Responsibility.....	326
§ 8.4 Duty to Defend.....	327
§ 8.5 Primary Insurer’s Duties.....	329
§ 8.6 Equitable Subrogation.....	332
 Chapter 9: Insurance Issues and Other Considerations.....	335
§ 9.1 Named Insured.....	335
§ 9.2 Named Insured – Organizations and Their Agents or Employees....	336
§ 9.3 Other/Omnibus Insureds.....	341
§ 9.4 Family Members.....	343
§ 9.5 Products-Completed Operations.....	345
§ 9.6 Additional Insureds.....	348
§ 9.7 Subrogation.....	352

Table of Contents

§ 9.8	Subrogation – Parties – Substitution.....	353
§ 9.9	Subrogation – Parties – Co-Insurer as Defendant.....	356
Chapter 10: Duty to Defend.....		359
§ 10.1	Allegations in the Complaint.....	359
§ 10.2	Insurer’s Duty to Investigate.....	360
§ 10.3	Defense Under Reservation of Rights.....	363
§ 10.4	Tripartite/Dual Attorney-Client Relationship Among Insurer, Insured, and Defense Counsel.....	367
§ 10.5	Selection of Counsel.....	370
§ 10.6	Costs of Defense – Contribution from Other Insurers.....	375
§ 10.7	Costs of Defense – Insurer’s Failure to Defend.....	376
§ 10.8	Wrongful Denial of Defense – Attorney’s Fees.....	378
§ 10.9	Wrongful Denial of Defense – Waiver and Estoppel.....	380
Chapter 11: Bad Faith and Extracontractual Liability.....		383
§ 11.1	Introduction.....	383
§ 11.2	Improper Claims Practices.....	386
§ 11.3	Fiduciary Duty.....	388
§ 11.4	Bad Faith – Adjusters.....	391
§ 11.5	Fiduciary Duty – Attorney Selected by Insurer.....	392
§ 11.6	Duty to Settle.....	396
§ 11.7	Duty to Settle – Assignability of Claims.....	398
§ 11.8	Duty to Settle – Time-Limit Demands.....	403
§ 11.9	Duty to Settle – Multiple Claimants.....	405
§ 11.10	Duty to Settle – Multiple Insureds.....	407
§ 11.11	Duty to Settle – Damages for Breach.....	408
§ 11.12	Breach of the Duty to Defend.....	412
§ 11.13	Common Law Bad Faith – Covenant of Good Faith and Fair Dealing.....	413
§ 11.14	Direct Actions.....	414
§ 11.15	Bad Faith – Expert Testimony.....	415

Table of Contents

Chapter 12: Practice and Procedure.....	417
I. DECLARATORY JUDGMENT.....	417
§ 12.1 When Declaratory Relief Is Appropriate.....	417
§ 12.2 South Carolina Courts.....	417
§ 12.3 Federal Courts.....	420
§ 12.4 Federal Courts – Parties and Required Parties.....	424
II. THIRD-PARTY PRACTICE.....	425
§ 12.5 Intervention.....	425
§ 12.6 Interpleader.....	433
§ 12.7 Impleader.....	438
III. DISCOVERY.....	443
§ 12.8 Claim Files: Attorney-Client and Work/Product Privileges.....	443
§ 12.9 Underwriting.....	446
§ 12.10 Reserves.....	449
IV. MOTION PRACTICE.....	452
§ 12.11 Motion to Dismiss – 12(b)(6).....	452
§ 12.12 Motion for Judgment on the Pleadings.....	455
§ 12.13 Motion for Summary Judgment.....	457
V. FORUM SELECTION.....	459
§ 12.14 Venue – State Court.....	459
§ 12.15 Venue – State Court – Transfer.....	460
§ 12.16 Venue – Federal Court.....	461
§ 12.17 Venue – Federal Court – Transfer.....	464
§ 12.18 Venue – Federal Court – First-Filed Rule.....	465
§ 12.19 Venue – Federal Court – First-Filed Rule – Exceptions.....	467
§ 12.20 Removal.....	467
§ 12.21 Removal – Fraudulent Joinder.....	469
§ 12.22 Removal – Realignment of Parties.....	472
Table of Cases.....	477